No. 84-773

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IN THE

Supreme Court of the United States

October Term, 1984

MICHAEL BENDER, *et al.*,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

JOHN C. YOUNGMAN, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE LUTHERAN COUNCIL IN THE USA AND THE UNITARIAN UNIVERSALIST ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Establishment Clause requires that secondary school authorities deny permission to a student religious club, whose activities include prayer and the reading of Scripture, to hold meetings under school auspices and on school property during class hours.

STATEMENT OF INTEREST

The American Jewish Committee ("AJC"), a national organization of approximately 50,000 members, founded in 1906, is dedicated to the defense of the civil rights and civil liberties of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society.

II

The Lutheran Council in the USA ("LCUSA") is a cooperative agency of five Lutheran churches, which have an aggregate membership totalling eight million persons. LCUSA is governed by a Board of Directors chosen by the five churches and expresses certain common religious concerns on behalf of its members. One of those concerns is the relationship between church and state. LCUSA has resolved to join the present brief out of its deep concern as to the possible intrusion of religion into the public school systems of this country and the possible adverse impact on the principle of separation of church and state.

The Unitarian Universalist Association ("UUA") is a denomination consisting of over 1,000 congregations with over 176,000 members. It is the policy of the UUA to intervene on an amicus basis where

First Amendment rights are threatened. Earlier this month, UUA adopted a resolution specifically opposing "equal access" plans for religious activities in public schools.

In the view of amici, to permit a secondary school student club to hold organized religious activities, at which a school monitor is required to be present, on public school property during school hours, would violate the First Amendment's Establishment Clause. The involvement of school authorities necessarily involved in the administration of such a club would inevitably constitute the kind of official endorsement of, and excessive entanglement with, religious practice, that the Constitution forbids to governmental authorities.

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This brief is submitted with the consent of the parties. Originals of the letters reflecting such consent are being lodged with the Clerk of the Court simultaneously with the filing of this Brief.

Statement of the Case

This action arises out of a challenge by a number of Williamsport Area High School students to the Williamsport Area School District's refusal to permit a student-initiated "non-denominational" religious club, named "Petros", to meet during a regularly scheduled class period at the beginning of the school day. J.A. 13-21,46. This class period is reserved for voluntary individual and group student activities, for 30 minutes two

mornings a week. Group activities include music, ecology, student government, speech and the arts. J.A. 102-03.

The club's organizers contemplated that its activities would include prayer, readings from Scripture and "the application of God's Holy Word to [the students'] problems and sharing of personal experiences." J.A.16,46. The students agreed to forego use of the school's bulletin board, newspaper, public address system and teacher advisors in connection with the activities of their proposed club. The school district denied permission to Petros to meet solely on the grounds that to grant such permission would be in violation of applicable law. J.A. 42,48,142.

The school district requires that student activities groups obtain school

permission in order to meet during the activity period. The only qualification articulated by the school district as to the nature of group activities permitted during the activity period is that they "contribute to the intellectual, physical or social development of the students and [are] otherwise considered legal and constitutionally proper." An adult advisor (usually a member of the faculty and, in any event, subject to approval by the administration) is required by law to be present at all student club meetings. The advisors generally participate in the student group meetings to the extent necessary "to help the activities." Participation by students in a group is completely voluntary, but each student must be on school grounds and accounted for during the activity period. Alternatives to participation in a group include study in the library, work with

the school's computer facilities, review of placement materials, or simply remaining in the home room until commencement of the next class period. J.A. 64,67-68,70,83,95-96,102-04.

The opinion of the Court of Appeals is reported at 741 F.2d 538 (3d Cir. 1984). The opinion of the District Court is reported at 563 F. Supp. 697 (M.D.Pa. 1983).

Summary of Argument

While student free speech rights may be implicated by the nature of the activity period created at Williamsport Area High School, it is clear that the proposed group prayer activity would impermissibly advance religion and would create excessive entanglement between the State and religion -- thus violating two

of the three prongs of the test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court of Appeals for the Third Circuit correctly determined that group prayer activity held on public school premises, conducted as part of an organized high school activity program at which a school monitor is required to be present and taking place during the hours of compulsory school attendance, violates the First Amendment's Establishment Clause.

This Court's holding in Widmar v. Vincent, 454 U.S. 263 (1981), does not require a different result. Unlike Widmar's university setting, the case at bar involves younger students in attendance at a secondary school, many attending pursuant to compulsory attendance laws. There can be no question that there are significant and cognizable differences between the extent of super-

vision required at these two types of institutions. In contrast to the situation in Widmar, faculty supervision is required throughout the student activity periods authorized by the Williamsport Area High School. In the conflict between the Free Speech Clause and the Establishment Clause, the balance must be weighted in favor of the State's compelling interest in preventing the appearance of official promotion of, and an impermissible entanglement with, religious activities in a public secondary school.

There is available no less restrictive alternative to the denial of permission for students to hold the proposed group prayer meetings. Alternatives which might be proposed, such as allowing a disclaimer to be posted or permitting such a program to take place

on the premises after school hours, would nevertheless leave open a serious potential for ostracization and stigmatization of those students who elect not to participate in such religious activities. Moreover, the danger of faculty entanglement in decisions having religious dimensions would not be resolved by such ameliorative steps. These are the very types of dangers which led the Framers to create an Establishment Clause whose concerns are co-equal with the legitimate concerns protected by the constitutional right of free speech.

Nor does the enactment into law, in August 1984, of the Equal Access Act, permitting student religious activities in secondary schools "during noninstructional time," suggest in any way that the result should be otherwise. The "equal access" student entitlements ostensibly created by

that Act may -- or may not -- ultimately be found to be distinguishable from the rights claimed by the students herein. In any event, in the end it is this Court which must determine the constitutionality of the access to school facilities sought by the students in the instant case, where the religious activity in question would take place during school hours. If such an allowance of religious practice under official auspices in a secondary school is in violation of the Establishment Clause, that constitutional failing will not be cured because Congress enacted a statute permitting a similar practice.

ARGUMENT

THE ESTABLISHMENT CLAUSE REQUIRES THAT PUBLIC SCHOOL AUTHORITIES DENY PERMISSION TO STUDENT RELIGIOUS CLUBS TO HOLD MEETINGS UNDER SCHOOL AUSPICES.

A. Religious Expression and Secular Speech are Not Constitutionally Equivalent in All Cases Involving Public Fora.

The First Amendment to the Constitution mandates that "Congress shall make no law respecting an establishment of religion." As this Court explained in Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), this provision was intended by the Framers "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." In serving that end, the Framers instituted a governmental policy of "neutrality" with respect to religion, which requires that "[n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over

another." Everson v. Board of Education, 330 U.S. 1, 15 (1947). The Court recently reiterated this established principle in Wallace v. Jaffree, ____ U.S.____, 53 U.S.L.W. 4665, 4671 (U.S. June 4, 1985), asserting that "the Government must pursue a course of complete neutrality toward religion."

To be sure, the First Amendment does not require -- or even contemplate --a regime of hostility toward religion. This was made clear by the Framers when they directly juxtaposed the Establishment Clause with the Free Exercise Clause. This theme was further explicated when the Court recognized, in Widmar v. Vincent, 454 U.S. 263, 276 (1981), that the Establishment Clause is "limited by" the Free Speech clause, so as to require that regulation of religious speech with respect to public fora on a content-

related basis be subject to "applicable constitutional standards." To say this, however, is not to suggest that the constitutional standards which are "applicable" will always be identical for religious and for non-religious speech.

Thus, in Widmar, the Court applied the well-settled rule that, in order for the state to justify a content-based exclusion of particular speech, it must show -- even with respect to religious speech -- that the challenged regulation is necessary to serve a compelling state interest and that it is narrowly drawn to serve that end. Widmar, 454 U.S. at 270 (citing Carey v. Brown, 447 U.S. 455, 461, 464-65 (1980)). Upon applying that test, the Court found that a public university had failed sufficiently to meet this exacting standard in demonstrating why religious student groups should not be

afforded the same access to university facilities as secular student groups.

In reaching that conclusion, the Court specifically acknowledged that the interest of the university in complying with its constitutional obligations under the Establishment Clause "may be characterized as compelling," but found -- in that specific case -- that the compelling interest did not necessitate the barring of religious groups from the public forum. Widmar, 454 U.S. at 271. In so saying, the Court implicitly acknowledged that the "applicable constitutional standards" are not identical for religious and non-religious speech, and that application of those standards will not always lead to

identical results.[1] Indeed, had the Court found otherwise, it would have obviated

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[1] In that respect, the Court agreed in principle, if not in result in the specific case, with that portion of Justice White's argument in dissent which asserted that religious worship qua speech must be treated differently from other varieties of protected speech if the Religion Clauses are not to "...be emptied of any independent meaning in circumstances in which religious practice took the form of speech". Widmar, 454 U.S. at 284 (White, J., dissenting). See id., 454 U.S. at 271 n.9 (Court's opinion) ("...[T]he Establishment Clause requires the State to distinguish between 'religious' speech -- speech, undertaken or approved by the State, the primary effect of which is to support an establishment of religion --and 'nonreligious' speech -- speech undertaken or approved by the State, the primary effect of which is not to support an establishment of religion. This distinction is required by the plain text of the Constitution.") This analysis is borne out by the fact that, even though the Government is free to take an ideological position on issues of public controversy so long as it does not, in so doing, improperly override individual freedoms of expression, it is peculiarly forbidden from endorsing a religious point of view. See generally Tribe, American Constitutional Law, §12-4 (1978).

the special concerns that led the Framers to deal with religious expression as a sui generis concern in the First Amendment. Where the treatment in a public forum of religious expression on the same basis as non-religious speech would, in a specific case, endanger the State's mandated "neutrality" with respect to religion, it follows that the compelling state interest in avoiding the establishment of religion may, in that case, prohibit the affording of "equal access" for religious groups in a purported public forum, even while permitting -- or even mandating -- such access in another forum. In each case the Court must analyze the particular facts against the countervailing principles involved.

Arguably, student free speech rights are implicated by the nature of the activity period created at Williamsport

High School, at least to the extent that students at Williamsport have generally been afforded a forum in which to engage in group activities which "contribute to the intellectual, physical or social development of the students."[2] However, even if the Court were to find that the activity period constitutes such a limited public forum, this does not end the inquiry. The Court, under the test enunciated in Widmar, must still determine whether, in this case, the state's compelling interest in preserving the

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2 It would appear that, to the extent a limited public forum may be said to have been created in Williamsport Area High School, the forum is not nearly so broad as that in Widmar, having been explicitly limited to activities which aid in student development. See Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 48 (1983) ("[E]ven if we assume that ... the school district has created a 'limited' public forum, the constitutional right of access would in any event extend only to other entities of similar character.")

principle of the separation of religion and state requires denial of permission for the religious club to meet.[3]

B. The Establishment Clause Required the School District to Deny Permission to the Student Religious Club to Meet.

The Establishment Clause was intended to protect against three primary evils: the "sponsorship, financial support, and active involvement" of the state in religious activity. Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

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[3] If the Court finds no limited public forum has been created, then the arguments herein -- which demonstrate that compelling Establishment Clause concerns required the school district's refusal of consent for Petros to meet -- constitute, a fortiori, a reasonable basis for denial of consent which is sufficient to deny access to a nonpublic forum. See Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 46 (1983). Of course, whatever the type of forum involved, expression may not be restricted merely because public officials oppose the speaker's point of view, id., but there has been no suggestion of such motivation in the case at bar.

Nowhere has the Court been more strictly watchful of the separation of church and state than in the case of the public elementary and secondary schools. The Court has consistently invalidated any appearance of sponsorship or entanglement with religious practice in the schools. As Justice Frankfurter stated in his concurring opinion in Illinois ex. rel. Mc. Collum v. Board of Education, 333 U.S. 203, 216 (1948).

> The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children...in an atmosphere free of pressures in a realm ... where conflicts are most easily and most bitterly engendered.

The nature of school-age children and youngsters, who are generally acknowledged to be at an age where "non-conformity is not an outstanding characteristic," was

also remarked upon by Justice Frankfurter as an important consideration. Id., 333 U.S. at 227.

Thus, in McCollum, this Court held unconstitutional a program pursuant to which religious teachers of various denominations were permitted to enter public schools during class hours and teach religious subjects to interested students. Similarly, the Court struck as unconstitutional state action authorizing brief, denominationally neutral, "voluntary" prayers to be recited at the beginning of each school day (Engel v. Vitale, 370 U.S. 421 (1962)). Most recently, a state statute providing for a one-minute period of silence at the beginning of the school day "for meditation or voluntary prayer," was struck when the Court found that the statute had been enacted for the sole purpose of

advancing religion and without any secular purpose (Wallace v. Jaffree, 53 U.S.L.W. at 4670-71). The Court has also struck as unconstitutional governmental enactments which provided for recitations from the Bible, or of the Lord's Prayer, at the beginning of each school day (School District of Abington Township v. Schempp, 374 U.S. 203 (1963)); and state legislation authorizing the posting of the Ten Commandments, purchased with private contributions, on the walls of public classrooms (Stone v. Graham, 449 U.S. 39 (1980) (per curiam)).

In contrast, the Court has upheld --asa properly neutral accommodation of religion and, therefore, constitutional --"released time" programs pursuant to which public school students are permitted to depart school premises during the school day in order to receive religious

instruction elsewhere (Zorach v. Clauson, 343 U.S. 306 (1952)); and, in dicta, has suggested that the institution of a "moment of silence" which steers clear of any indication to students that the moment ought to be utilized for prayer would be sustainable as such a reasonable accomodation, or as in service of secular purposes (Wallace v. Jaffree, 53 U.S.L.W. at 4671; similarly, id., 53 U.S.L.W. at 4673 (Powell, J., concurring)). Moreover, the restrictions necessary to protect Establishment Clause interests have not been so strictly enforced in arenas not involving the public schools. Thus, in contrast to, inter alia, Engel v. Vitale, and Stone v. Graham, this Court has upheld a municipality's inclusion of a Nativity Scene in an annual Christmas pageant (Lynch v. Donnelly, 465 U.S. _____, 104 S.Ct. 1355 (1984)), and the employment by a state

legislature of Legislative Chaplains (Marsh v. Chambers, 463 U.S. 783 (1983)).

It is this scrupulous avoidance of any hint of endorsement of religious practice in the public school, a principle reinforced by the Court's holding in Wallace v. Jaffree, that must be borne in mind in applying the Establishment Clause to the case at bar. The special role of the public schools, and the Court's special concern with the avoidance of placing improper pressures on those who are the most impressionable, makes it far from "inherently implausible" (Petitioner's Brief ("Pet. Brief") at 10) that the Constitution may very well require public high schools to do that which public universities are forbidden to do, i.e., deny to organized religious student groups "equal access" to school facilities (and the concomitant appearance

of endorsement) which is available to secular student groups.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court set forth the by now familiar three-prong test for identifying impermissible governmental establishment of religion, the validity of which was recently reaffirmed by a majority of the Court in Wallace v. Jaffree, 53 U.S.L.W. at 4670 (Court's opinion), 4672 (Powell, J., concurring). Each of three requirements must be met if governmental practice is to be upheld against an Establishment Clause challenge: "First the [governmental practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion....; finally, the [practice] must not foster 'an excessive government entanglement with religion.'" Lemon v.

Kurtzman, 403 U.S. at 612-13.

Amici do not question the secular purpose for which Williamsport Area High School instituted its extracurricular activity period. However, if the high school authorities were to permit Petitioners to hold their religious club meetings on school property, during class hours and under official auspices, this would violate the second and third prongs of the Lemon v. Kurtzman test and thereby violate the Establishment Clause. To the extent this creates a conflict between the Free Speech Clause and the Establishment Clause, the balance must be weighted in favor of the State's interest, recognized as compelling in Widmar, in preventing official promotion of, and an impermissible entanglement with, religious activities in a public secondary

school.[4]

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[4] For the school authorities to allow such a religious club to meet under school auspices would similarly run afoul of the alternate analysis proposed by Justice O'Connor. Under Justice O'Connor's analysis the courts would be obliged to determine whether a challenged governmental practice "makes adherence to religion relevant to a person's standing in the political community," thereby sending "'...a message to nonadherents that they are outsiders, not full members of the political community or an accompanying message to adherents that they are insiders, favored members of the political community.'" Wallace v. Jaffree, 53 U.S.L.W. at 4673-74 (O'Connor, J., concurring) (citing Lynch v. Donelly, 465 U.S. at ____, 104 S.Ct. at 1366). Once religious clubs are instituted under the circumstances set forth here, a danger of constitutional dimensions generally will be posed -- certainly, at least,in any community in which a significant proportion of students are active adherents of a particular faith (or of a number of faiths) -- that a student not of the faith (or faiths) institutionalized by the creation of official religious clubs will be "...left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her non-conformity." Id., 53 U.S.L.W. at 4674. Thus, a system of school sponsored religious clubs would be unlike a state sponsored moment of silence, in that the former potentially casts the nonadherents in the role of conspicious nonparticipants in prayer and thereby may well

(i) Principal or Primary Effect of Advancing Religion.

The provision of "equal access" to the religious clubs would have a principal or primary effect of advancing religion. Concededly, "not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." Committee for Public Education v. Nyquist, 413 U.S. 756, 771 (1973). It is also acknowledged that the Court, in Widmar, looked to the forum's availability to a broad spectrum of groups in determining that the opening of the university's forum to a religious student group would not have the primary effect of advancing religion. Widmar v. Vincent, 454 U.S. at 274-75.

(footnote continued)

"favor the child who chooses to pray... ." Id., 53 U.S.L.W. at 4675.

In so holding, however, the Court noted that "an open forum in a public university does not confer a confirmation of State approval of religious sects and practices," id., 454 U.S. at 274 (emphasis supplied), and specifically contrasted university and secondary school students: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion." Id., 454 U.S. at 274 n.14. This factor, the lesser impressionability of older college students and, accordingly, the lesser likelihood that such students would perceive a religious group as enjoying official endorsement, was treated by the Widmar Court as an independent factor justifying the opening of the university to religious groups, wholly apart from the fact that the school's open forum was

available to a broad spectrum of groups.

Widmar falls squarely within the Court's consistent perception that "[t]he college classroom with its surrounding environs is particularly the 'marketplace of ideas.'" Healy v. James, 408 U.S. 169, 180 (1972). The open forum created by the university in Widmar included over 100 recognized student groups, ranging over a broad range of positions and interests and including Students for a Democratic Society and the Young Socialist Alliance. Consistent with the notion that the colleges are a forum in which the student is presented with, and learns to select among, widely divergent ideas and theories, the Court declined to interpret the existence of such student groups as an endorsement by the university of their views.

It is the clear import of Widmar that, where such student perception of official imprimatur is likely to result, the opening of school facilities to a religious group would have, as a primary effect, the advancement of religion. Based upon that test, the Court of Appeals herein properly held that a high school setting is more susceptible than a university to an appearance of providing official imprimatur for a religious group: "[D]ifferent considerations present a more serious question of state advancement or endorsement of religion than was present in Widmar .... [T]he special circumstances inherent in a high school create heightened dangers in the context of the Establishment Clause." 741 F. 2d at 552.

The distinction between university and high school settings was borne out, in Tilton v. Richardson, 403 U.S. 672 (1971),

in which this Court upheld grants to church-related colleges and universities for the construction of buildings and facilities exclusively for secular educational purposes, based, in part, upon the observation that:

> There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives or limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunity for sectarian influence by virtue of their own internal disciplines.

Id., 403 U.S. at 686 (citing Gianelli, Religious Liberty, Nonestablishment and Doctrinal Development, pt. II, the Nonestablishment Principle, 81 Harv. L. Rev. 513, 583 (1968)). See also Lemon v. Kurtzman, 403 U.S. at 616. The general

distinction between university and secondary school students is reinforced by the fact that a substantial proportion of the students at a secondary school are subject to compulsory attendance laws. McCollum, 333 U.S. at 212.

High schools, by contrast, present a more limited, socializing function, as one would expect in the context of a younger student body still being educated as to the broader values which will ultimately form the framework within which they can approach the give-and-take of college study. As this Court has stated, an important function of high schools is "inculcating fundamental values necessary to the maintenance of a democratic political system." Board of Education v. Pico, 457 U.S. 853, 864 (1982) (Brennan, J., for the plurality). These differing roles of the high schools and colleges

make clear that an officially recognized school religious organization in a secondary school is more likely to appear to enjoy official endorsement.[5]

This analysis is reinforced by the particulars of the operation of Williamsport's student activity groups. School groups meet at a regular time

[5] Petitioners erroneously compare the case at bar to various other cases in which Federal courts are said to have held that "[h]igh school students are able to hear other students' controversial expression without misperceiving school endorsement." Pet. Brief at 29. However, just as the state is constitutionally free to express a point of view with respect to virtually every topic other than religion (see footnote 1, supra), so the Constitution mandates that significantly greater care be taken by school authorities so as not to appear in any fashion to endorse, or condemn, religious views than with respect to other subject areas. Moreover, the avoidance of any such inappropriate perception must be based upon a judgment as to the likely reaction of the least, rather than the most, mature of the student population. Cf., Wallace v. Jaffree, 53 U.S.L.W. at 4673 (Powell, J., concurring) ("If it were necessary to reach the 'effects' prong of Lemon, we would be concerned primarily with the effect on the minds and feelings of immature pupils.").

during the school day at a time when all students are already required to be in school; many students are present in school pursuant to compulsory attendance laws; school approval is required before any student group may meet during the activity period; a proposed student group may only meet if it contributes "to the intellectual, physical and social development of the students"; and each student group must have an adult advisor, approved by the school principal, who is required to attend each meeting. J.A. 64,67-68,70,83,95-96,102-04; 24 Pa. Stat. Ann. §§ 13-1326,13-1327 (1962 & supp. 1985). None of these regulations or restrictions were applicable to the university student groups discussed in Widmar, nor is the extent of faculty supervision comparable in the latter case. Given Williamsport Area High School's involvement in the activities of

its student group and the differing natures of the student bodies involved, the Court of Appeals rightly held that school permission for a student religious group to meet "would be perceived as endorsing and encouraging religious practice." 741 F.2d at 553.

Petitioners cite a panoply of academic experts in support of their thesis that secondary school students are, indeed, mature enough to understand that student religious groups are not endorsed by school authorities simply because they are permitted to hold meetings. No doubt, if secondary school students were allowed to organize such groups under school auspices, Petitioners would next argue for the ability of elementary school students to make such distinctions. Whatever line is ultimately drawn will be a source of dispute, and --as is

the nature of the law -- will include on both sides of the line students capable and incapable of discerning what does and does not constitute school endorsement. However, there are clear distinctions, supported by this Court's precedents, between university and secondary school students, in terms of the applicability of mandatory attendance laws, the differing roles of universities and secondary schools, and the substantially greater control over students in the high school environment. All of these are distinctions upon which this Court has relied in the past, and they constitute appropriate criteria in this case.

Already in McCollum, Justice Reed's early allusion, in his lone dissent, to an "equal access" argument -- by his reference to the fact that public school buildings were used for other community

activities, as well as for the challenged religious group activities, id., 333 U.S. at 239 n.2 (Reed, J., dissenting) -- was rebutted by the Court's observation that "religious eduction so conducted on school time and property is patently woven into the working scheme of the school." Id., 333 U.S. at 227 (Frankfurter, J., concurring). It is the use of school time and property for religious purposes that inexorably places this case under the rule of McCollum -- and not that of Zorach v. Clauson, in which the removal of "released time" religious instruction from school premises was deemed the paramount factor distinguishing the latter case from McCollum. The reasoning of McCollum is as applicable, indeed as compelling, today in connection with the religious prayer meetings proposed to be held in Williamsport Area High School.

(ii) Likelihood of Excessive Entanglement.

The presence of a school official during student group meetings -- deemed by the school authorities to be an essential requirement for the proper running of a secondary school -- creates a nearly unavoidable likelihood of excessive entanglement between religion and state. Unlike the university student clubs in Widmar, Williamsport Area High School is required to maintain adult supervision of the meetings of its student groups, and the adult supervisors are generally involved in the content of student group meetings. The presence of these adult supervisors at a religious student club meeting will, inevitably, involve them in the administration of that club. Such involvement will be necessary, if for nothing else, to ensure

that student participation is, in fact, voluntary, to prevent any action by the student group that would suggest it is the beneficiary of official endorsement (to the extent that the club's very formation under school auspices does not already convey that message), and to further ensure that the group is run consistently with its purported status as a "non-denominational" (which is not to say non-sectarian) club.

This last duty would be the most problematic, as disputes among students over religious practice, form of prayer or other religious issues at a religious student club meeting would draw the faculty member, who is required to be present, into a role involving "... the school's authority in reaching a determination with respect to the validity of various religious beliefs and practices."

741 F.2d at 557. Thus, while the record reflects that, in this case, the teacher functioning as monitor did no more than open the room, take attendance and, while the meeting was in progress, grade papers, the danger is great of other school officials not taking such a detached role. (There is also danger that students, aware from communal interaction of the religious beliefs and convictions of their instructors (and of other students), will come to feel ostracized and stigmatized if they elect not to participate in religious activities.)

This Court has consistently struck programs of aid for secular purposes to religious schools where administration of that aid would involve a "comprehensive, discriminating and continuing ... surveillance" to ensure that the aid was

not utilized for a forbidden purpose. Lemon v. Kurtzman, 403 U.S. at 619. In Widmar, the Court found that a rule permitting a religious university student club to meet would require less entanglement than a rule excluding such clubs. Id., 454 U.S. 272 n. 11. However, the numerous factual distinctions between Widmar and the case at bar -- not the least of which are the requisite constant presence of a faculty member at club meetings and the manifestly greater administrative control at Williamsport of student activities generally -- will give rise to just the types of continuing surveillance, to avoid violations of the First Amendment, which Lemon v. Kurtzman teaches must be prevented.

Moreover, as one leading commentator has noted, however serious the type of administrative entanglement between

religion and state avoided by the line of cases typified by Lemon v. Kurtzman, "... the form of entanglement the Supreme Court deems most subversive of first amendment values is that which involves government not only in the apparatus of religion but in its very spirit -- in its decisions on belief and ritual." Tribe, American Constitutional Law, §14-12 at 870 (1978) (emphasis in original). It is fear of this most divisive of entanglements --determination of who is right and who is wrong in fundamental matters of conscience -- that has led the Court to require of the government "... a strict neutrality toward theological questions." Abington School Dist. v. Schempp, 374 U.S. at 243 (Brennan, J., concurring). Yet, in fostering an atmosphere in which a faculty supervisor will likely be called upon to resolve disputes as to religious practice and liturgy, it is

precisely this type of entanglement (together with a problematic likelihood of administrative entanglement) toward which official recognition of religious student groups in public schools would inevitably lead.

By contrast, the excessive entanglement between religion and state which Petitioners assert will result from denial of permission for religious student groups to meet is a chimera. We are not dealing here with a borderline case in which a challenged activity is "arguably non-religious." See Tribe at §14-6. Rather the student group here is clearly involved in religious activity. Were the courts and administrative authorities deemed totally unable to make a threshold determination as to what constitutes religion and religious practice there could not be the line of cases in which certain governmental

actions have been forbidden because they would run afoul of the Establishment Clause. The capacity of appropriate authorities to make a limited determination of what is, and what is not, religious activity, for purposes of the Establishment Clause, is plainly necessary if that provision is not to be drained of all meaning.

C. No Less Restrictive Alternative is Available.

There is available no less restrictive alternative to the denial of permission for students to hold the proposed group religious meetings. As has been discussed above, the school's allowance of such an organized activity lends itself to an appearance of official endorsement and to a likelihood of impermissible entanglement. Alternatives, such

as the posting of a disclaimer or permitting the religious group program to take place on the premises after school hours, would nevertheless leave open a serious potential for ostracization and stigmatization of those students who elect not to participate in the religious activities, and of faculty entanglement with those activities.

Every appellate court before which this issue has been presented has recognized that the dangers posed by faculty involvement, once religious activity takes on the dress of a school organization, are so serious as to require denial altogether of permission to hold religious meetings under official

sponsorship.[6] See Lubbock Civil Liberties Union v. Lubbock Ind. School Dist., 669 F.2d 1038, 1044-48 (5th Cir.1982), cert. denied, 459 U.S. 1155 (1983); Brandon v. Board of Education of Guilderland, 635 F.2d 971, 978-80 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), reh'g denied, 455 U.S. 983 (1982); Nartowicz v. Clayton Co. School Dist., 736 F.2d 646 (11th Cir. 1984) (per curiam) (upholding preliminary injunction prohibiting student religious groups from meeting on school premises after school hours under faculty supervision). See also Mergens v. Bd. of Education of the Westside Comm'y Schools, No. CV 85-0-426, slip op. at 9-12 (D.Neb. May 23, 1985) (denying request of student religious

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[6] However, this is not to say that the students might not be able to engage in student-initiated prayer, provided that such religious activity does not seek the school's endorsement as an official student group. See Part D below.

group for preliminary injunction to compel school board to allow religious club meetings); but see Amidei v. Spring Branch Independent School District, No. 14-84-7673 (S.D. Tex. April 26, 1985).

D. Denial of Permission for Student Religious Groups to Meet Does Not Constitute "Hostility Towards Religion."

In short, then, the compelling interests imposed by the Establishment Clause required, in this case and on these facts, that the school deny permission to a student religious club to meet under official auspices. It must be stressed that this result may in no way be delineated, as Petitioners have asserted, as an expression of hostility towards religion nor does this result "effectively terminate individual students' religious

freedom at school" (Pet. Brief at 48). Neither does it follow, as Petitioners' Brief argues, that "[i]f equal access is ruled unconstitutional, school officials will believe all students' individual religious expressions must be stifled." Pet. Brief at 11-12. In all of the foregoing, Petitioners misconstrue both the Court of Appeals' decision and the requirements of the Establishment Clause.

As Petitioners have themselves stated, the Establishment Clause is directed toward state-initiated, as opposed to self-initiated, religious speech. However, this Court's decisions, up to and including Wallace v. Jafree, demonstrate that there is a compelling need to avoid placing the authority of the state behind religion. This requires sensitivity to the potential for unconscious, subtle pressures which exist

in the public school -- even when, in other subject areas, schools may be permitted to function more freely as fora of discourse. It is towards this end that the Court has acted rigorously to prevent organized religious activity at the primary and secondary school level.

Nevertheless, "[n]othing in the United States Constitution as interpreted by [the Supreme] Court . . . prohibits public school students from voluntarily praying at any time before, during, or after the school day." Wallace v. Jaffree, 53 U.S.L.W. at 4673 (O'Connor, J., concurring). Quite the opposite, states may properly permit "voluntary silent prayers of students who are so inclined" provided that there is no official encouragement of such activity. Id. Similarly, this Court's decisions should not be construed so as to prevent

student-initiated religious conversation between students, or prayer, during a truly unorganized "free period" at school. See Opinion of the Attorney General of the State of Maryland No. 84-031 (December 6, 1984) (to be published at 69 Opinions of the Attorney General ____ (1984)) .[7]

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7 The close of Petitioners' brief presents a "parade of horribles", a number of incidents in which school administrators are said to have prohibited "all forms of private religious expression on school campus." Pet. Brief, at 48-49. It is noteworthy that these involve not court cases, but anecdotal reports from the Congressional Record and newspapers. To the extent that the rights of students have been unduly restricted or abused, the courts are, of course, available to vindicate those rights. However, such sporadic incidents -- not to be found, incidentally, in any portion of the record -- do not diminish the important principles and considerations which the Establishment Clause imposes. Moreover, to permit public schools officially to organize student religious groups would open the door to yet another variety of abuses and "horror stories."

Rather, the Court has simply mandated, and the Court of Appeals held accordingly here, that school authorities should not be involved in religious activities in any fashion which would suggest either endorsement or condemnation.

E. Congress' Enactment of the Equal Access Act Does Not Eliminate the Establishment Clause Concerns.

The Equal Access Act, 20 U.S.C. §§4071-4072 (1984) (the "Act"), passed by Congress the day after the decision of the Court of Appeals below, provides, in relevant part, that:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the

> basis of the religious, political, philosophical, or other content of the speech at such meetings. §4071(a).

The litigation below did not deal -- as it could not -- with the meaning, applicability or constitutionality of the Act. Thus, there is no record which would allow this Court to determine whether Williamsport Area High School has a "limited open forum" within the meaning of the Act. The Act provides that "[a] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." §4071 (b)."Noninstructional time" is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." §4072(4). It may well be, given the

structure of Williamsport's student voluntary activity which takes place within the context of the first class period of the day, that "noninstructional time" is not involved and the activity period is thus not covered by the Act. Moreover, the legislative history of the Act strongly supports an argument that it was enacted with the purpose of making possible the meetings of religious groups in public secondary schools. See, e.g., 130 Cong. Rec.S8331-36 (daily ed. June 27, 1984). Even if the Act were otherwise constitutional, this purpose of advancing religion would, in and of itself, be sufficient to invalidate the Act. See Wallace v. Jaffree, 53 U.S.L.W. at 4673 (Powell, J., concurring). Thus, the "equal access" rights ostensibly created by the Act may -- or may not -- ultimately by found to be distinguishable from the rights claimed by the Peti-

tioners, or the Act may ultimately prove to be unconstitutional for reasons unrelated to the case at bar.

In any event, in the end, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803). It is this Court which must determine the constitutionality of the access to school facilities sought by the students here, regardless of whether the activity period might ultimately be found to be compelled by the Act. Congress may not legislatively make constitutional that which is forbidden under the Establishment Clause. That clause demands that religious expression not be treated identically with secular speech where to do so would erode the principle of separation of church and state. Accordingly, to the extent the Act may

compel the allowance of religious practices under official auspices in the circumstances of this case, that Act is unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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